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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 SKY-STEVEN THOMAS MILLER,

11 Plaintiff,

12 v.  
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14 RON VAN BOENING et al,

15 Defendants.

CASE NO. C10-5712-RBL-JRC

ORDER REGARDING  
SEVERAL OUTSTANDING  
MOTIONS

16 This 42 U.S.C. §1983 civil rights matter has been referred to the undersigned  
17 Magistrate Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B) and Local  
18 Magistrate Judge Rules MJR 1, MJR 3, and MJR 4. Plaintiff filed a motion asking  
19 that the Court again attempt service on physician assistant Bartram (ECF No. 58).  
20 He has also filed two related motions: one asking for relief from the prior order  
21 regarding service on defendant Bartram (ECF No. 62), and the other asking for an  
22 extension of time to serve defendant Bartram (ECF No. 64).  
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1 Perfecting service on defendant Bartram has been an issue throughout this  
2 action. The action was filed in September of 2010, and the Court attempted  
3 service in October of 2010. In February of 2011, plaintiff asked the Court to  
4 attempt again to serve this defendant (ECF No. 16). In March, a Report and  
5 Recommendation was adopted and the District Court stated that “plaintiff also has  
6 thirty days to either perfect service on defendant Bartram or show cause why he  
7 has not perfected service on this defendant.” (ECF No. 19). This Court denied  
8 plaintiff’s motion to serve defendant Bartram at the McNeil Island Corrections  
9 Center because the Corrections Center was closed and plaintiff had failed to  
10 provide a more current working address for defendant Bertram.(ECF No. 21).  
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13 In April 2011, plaintiff sent a letter to Court and alleged that he had provided  
14 the Court with a home address (ECF No. 23). In May 2011, the Court attempted  
15 service at the address plaintiff provided and the document was returned as  
16 undeliverable (ECF No. 25).  
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18 Plaintiff filed another motion to serve this defendant later in May of 2011  
19 (ECF No. 30). This motion was denied in June of 2011 because plaintiff had failed  
20 to provide this Court with any new or different address for defendant Bartram  
21 (ECF No. 39). Discovery proceeded and the discovery cutoff date was July 15,  
22 2011 (ECF No. 18).  
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1 Now, well over a year after this action was commenced, and several months  
2 after discovery has closed, and after the deadline for dispositive motions has past,  
3 plaintiff again asks the Court to attempt to serve defendant Bartram at a newly  
4 provided address.

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6 Fed. R. Civ. P. 4(m) provides that if service of a summons and complaint is  
7 not made within 120 days of filing the court shall dismiss without prejudice unless  
8 the plaintiff can show good cause why service was not made within that time. The  
9 standard of review is abuse of discretion, which indicates that the court has  
10 discretion in deciding if dismissal is proper. Wei v. State of Hawaii, 763 F.2d 370,  
11 371 (9th Cir. 1985).

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13 The Ninth Circuit has stated that failure to comply with the service  
14 requirements does not mandate dismissal and the rule should be given liberal and  
15 flexible construction as long as the defendant receives sufficient notice of the  
16 complaint. United Food & Commercial Workers Union v. Alpha Beta Co., 736  
17 F.2d 1371, 1382 (9th Cir. 1984). Failure to follow technical requirements does not  
18 warrant dismissal if “(a) the party that had to be served personally received actual  
19 notice, (b) the defendants would suffer no prejudice from the defect in service, (c)  
20 there is a justifiable excuse for failure to serve properly, and (d) the plaintiff would  
21 be severely prejudiced if his complaint were dismissed.” Borzeka v. Heckler, 739  
22 F.2d 444, 447 (9th Cir. 1984).  
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1 Here, while plaintiff has taken an inordinately long time to provide a new or  
2 different address, the Court will once again try and perfect service. The motion is  
3 GRANTED.

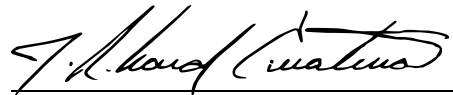
4 Accordingly, Plaintiff's Motion for Relief from Judgment or Order (ECF  
5 No. 62) and Plaintiff's Motion for Extension of Time (ECF No. 64) are also  
6 GRANTED.  
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8 Plaintiff has not shown sufficient grounds for appointment of counsel and  
9 counsel is not required for this civil rights action. There is no right to have counsel  
10 appointed in cases brought under 42 U.S.C. § 1983. Although the court can  
11 request counsel to represent a party, 28 U.S.C. § 1915(e) (1), the court may do so  
12 only in exceptional circumstances. Wilborn v. Escalderon, 789 F.2d 1328, 1331  
13 (9th Cir. 1986); Franklin v. Murphy, 745 F.2d 1221, 1236 (9th Cir. 1984); Aldabe  
14 v. Aldabe, 616 F.2d 1089 (9th Cir. 1980). A finding of exceptional circumstances  
15 requires an evaluation of both the likelihood of success on the merits and the  
16 ability of the plaintiff to articulate his claims pro se in light of the complexity of  
17 the legal issues involved. Wilborn, 789 F.2d at 1331.  
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19 Plaintiff has demonstrated an adequate ability to articulate his claims pro se.  
20 His pleadings to date have been clear and fairly concise. Plaintiff has made no  
21 showing of a likelihood of success on the merits. The fact that there are issues of  
22 fact precluding a grant of summary judgment does not equate to a showing of a  
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1 likelihood of success on the merits. Therefore, Plaintiff's Motion for Appointment  
2 of Counsel (ECF No. 63) is hereby DENIED.

3 Dated this 6th day of December, 2011.  
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7 J. Richard Creatura  
8 United States Magistrate Judge  
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